In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-607

CLEVELAND MILLS COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III, 1973ed. 2000e-5(f)(1), authorizes the Equal Employment Opportunity Commission to bring a civil action against a respondent from whom it has been unable to secure an acceptable conciliation agreement. The issue in this case is whether the Commission's authority to bring suit under that Section expires after 180 days from the filing of a charge alleging that the respondent has engaged in an unlawful employment practice.

1. On August 2, 1968, a charge was filed by a member of the Commission alleging that petitioner had engaged in a racially discriminatory employment practice. The Commission thereafter found reasonable cause to believe that a portion of the charge was true, and it attempted to rectify the situation through its informal conciliation

methods. On November 28, 1972, however, when the Commission concluded that its conciliation efforts would not be fruitful, it notified the persons alleged to be aggrieved by the company's unlawful employment practices that the Commission had not entered into a conciliation agreement and that the aggrieved persons therefore were free to bring a private civil action against the company within 90 days of receiving that notice. No such action was commenced within the 90-day period.

The Commission brought the present action on March 2, 1973, in the United States District Court for the Western District of North Carolina. Its complaint alleged that petitioner engaged in a variety of racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, and it sought injunctive and other relief to eliminate the effects of such past and present discrimination. The district court dismissed the action on the ground that it was untimely (Pet. App. 13a-22a). It held that "the Commission's power to institute action ceases if a suit is not filed within one hundred and eighty days from the filing of the charge" and that "[t]he power and right to bring a civil action in court is then transferred by the statute to the aggrieved party" (*id.* at 19a).

The court of appeals reversed. It held that "the 180-day period contained in [Section 706(f)(1)] is referable to the beginning of the time within which an aggrieved party may file a private action, but that its expiration does not finally terminate the Commission's right of action" (*id.* at 12a). "The text of the statute, what light we can glean from the legislative history and the basic legislative purposes sought to be served all trend against the rigid restriction of the Commission's enforcement power which [petitioner] urges upon us" (*id.* at 11a).

2. The decision of the court of appeals is correct, and further review is not warranted. Petitioner's contention that the Commission's right of action expires after 180 days from the filing of a charge is without support in the Act's language, its scheme, or its legislative history. Although the district courts have reached conflicting results with respect to the issue (see Pet. App. 10a, n. 9), the only other court of appeals that has decided the question agreed with the decision in the present case. *Equal Employment Opportunity Commission* v. *Louisville & Nashville R.R. Co.*, 505 F.2d 610 (C.A. 5).

Section 706(f)(1) provides in pertinent part:

> If within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * * If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * *, the Commission has not filed a civil action under this section * * *, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * *

As the court of appeals correctly stated, "[t]he text of the section contains no expressed or clearly implied time limitation upon the Commission's right to file a civil action once it has accrued" (Pet. App. 5a).

The Section is divided into two parts and creates two rights. The first part establishes the Commission's right to sue and places two conditions upon that right: (1) that more than 30 days must have elapsed since the filing of the charge with the Commission, and (2) that the Commission must have been unable to secure from the respondent an acceptable conciliation agreement. The second part establishes the right of private parties to sue and places two conditions upon that right: (1) that the Commission must have either dismissed the charge or failed, within 180 days from the filing of the charge, to bring a civil action or to enter into a conciliation agreement to which the person aggrieved is a party, and (2) that the private action must be filed within 90 days after the party has been notified by the Commission that the first condition has been met.

The 90-day time limitation applies only to private suits; there is no statutory time limitation applicable to suits by the Commission. The period of 180 days after the filing of the charge is not the time within which the Commission *must* bring an action but the time within which a private party may *not* bring an action. Its function is to foster the informal resolution of charges by ensuring that the Commission has a minimum period within which to consider a charge and to utilize its "informal methods of conference, conciliation, and persuasion" (42 U.S.C. 2000e-5(b)) in an effort to resolve the charge without litigation.

There is no reason to infer, as petitioner does, "that if the Commission allows its 180 day period to go by

without suing, then the right of suing goes over to the 'aggrieved' person" (Pet. 6). As the court of appeals stated (Pet. App. 6a):

> The 180-day period serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement. One would suppose that if the Congress had intended to cut off the Commission's right of action, it would have included clear language to that effect, just as it did when it clearly expressed its intention to cut off the individual's private right of action.

Petitioner's construction of Section 706(f)(1) would defeat the legislative objectives. The 1972 amendments gave the Commission the power to vindicate the public interest by court action to enforce the provisions of Title VII when the Commission's conciliation methods do not result in voluntary compliance. The amendments also carried forward the right of aggrieved persons to sue on their own behalf in order to ensure "that all avenues be left open for quick and effective relief" (Conference Committee's Section-by-Section Analysis, 118 Cong. Rec. 7168).

As the court of appeals stated, however, Congress intended that "there should be primary reliance upon the powers of enforcement to be conferred upon the Commission, and not upon private lawsuits, to achieve equal employment opportunity" (Pet. App. 7a). The Conference Committee's Section-by-Section Analysis of the 1972 amendments stated: "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate" (118 Cong. Rec. 7168).

Congress recognized that the Commission's informal conciliation procedures were time-consuming and that the Commission had a substantial backlog of cases (see Pet. App. 7a). As the court of appeals stated, "[i]n the administrative process careful study of an employer's employment practices and thorough exploration of all reasonable bases for agreement and compromise may require time" (*id.* at 8a). The purpose of the private right of action was not to accelerate the Commission's informal handling of charges by cutting off its power to sue after 180 days. It was, rather, "to make sure that the person aggrieved does not have to endure lengthy delays" when the informal administrative procedures cannot be expeditiously terminated (118 Cong. Rec. 7168). As the court of appeals correctly reasoned (Pet. App. 8a):

> Great haste in filing judicial proceedings before the administrative procedures are mature would result in burdens and disruptions to the Commission and to employers which would hardly be calculated to further the effectiveness of procedures directed toward voluntary compliance. The congressional purpose that the possibilities of voluntary compliance by agreement be first thoroughly explored and the congressional purpose that judicial enforcement proceedings be primarily the province and responsibility of the Commission may be harmonized but not if a 180-day period from the filing of the charge is imposed for the filing of judicial proceedings.[1]

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[1]See also the Fifth Circuit's opinion in *Louisville & Nashville, supra,* 505 F. 2d at 617:

> In addition to foreclosing effective relief for a large number of complainants, the 180-day limitation would hamper conciliation by forcing the Commission to file suit lest its right be cut off. It is doubtful that Congress would have required EEOC to certify that conciliation had failed before suing but would have seriously compromised the Commission's ability to conciliate by limiting it to 180 days.

A further indication that Congress did not intend to impose a 180-day limitation on the Commission's power to sue is that its newly-created right of action was expressly made applicable to all charges pending before the Commission at the time the 1972 amendments were enacted (86 Stat. 113).[2] As the Fifth Circuit stated in *Louisville & Nashville, supra*, 505 F.2d at 613:

> It was apparent that the Commission would be precluded from acting on most of the crush of pre-1972 cases if a 180-day limitation applied. Even if the alleged 180-day limitation were construed to run from the date of the amendment applying the Commission's new right to bring suit in pending cases (March 24, 1972), most of these cases could not have been brought in time because of the enormous backlog. * * * We are reluctant to nullify the provision extending the Commission's right to sue in pending cases, especially when the plain language of the statute points in the other direction.

Section 706(f)(1) provides that, if a person aggrieved files a civil action within the allowed 90-day period, "the court may, in its discretion, permit the Commission * * * to intervene in such civil action upon certification that the case is of general public importance." Petitioner argues (Pet. 7-8) that there would be no need for this provision if the Commission's own power to sue were still alive after the 180-day period. That contention was correctly answered by the Fifth Circuit in *Louisville & Nashville, supra*, 505 F.2d at 614:

> The existence of this right [to seek intervention] does not indicate that the Commission's right to sue

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[2]It was estimated that there were 40,000 cases then pending. See S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5, 6, 87.

terminates at the beginning of the period during which the Charging Party may sue. The Commission's right to bring actions after one hundred and eighty days does not render its right of intervention superfluous. Large groups of employees whom the EEOC is charged with protecting would be bound by judgments entered in class actions brought by private parties. The Commission's right to sue could not prevent this injury, but its right to intervene does.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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